

**BY ORDER OF THE
SECRETARY OF THE AIR FORCE**



AIR FORCE MANUAL 51-1202

8 NOVEMBER 2016

Law

***ALTERNATIVE DISPUTE
RESOLUTION OF CONTRACT
CONTROVERSIES, CLAIMS,
PROTESTS, DISPUTES, AND
TRANSACTIONAL DISPUTES***

COMPLIANCE WITH THIS PUBLICATION IS MANDATORY

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(Hon. Gordon O. Tanner)

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This manual implements Air Force Policy Directive (AFPD) 51-12, *Alternative Dispute Resolution*. It provides procedures for and delineates relevant organizations pertaining to the resolution of Air Force contract controversies, claims, protests, disputes, and transactional disputes via Alternative Dispute Resolution (ADR). Consistent with AFFARS 5333.214(c), it delineates factors that indicate whether ADR may not be appropriate, in addition to those prescribed in 5 U.S.C. 572(b). It also incorporates by reference the guidance contained in the Air Force Alternative Dispute Resolution Deskbook for Acquisition Professionals found at www.af.adr.mil. Although this publication is placed in the 51 (Law) series, it affects organizations outside the Office of the General Counsel and the Judge Advocate General Corps. This publication applies to all activities in the Department of the Air Force.

Refer recommended changes and questions about this publication to the SAF/GCR using AF Form 847, *Recommendation for Change of Publication*; route AF Form 847 from the field through the appropriate functional chain of command. Ensure that all records created as a result of processes prescribed in this publication are maintained IAW Air Force Manual (AFMAN) 33-363, Management of Records, and disposed of IAW the Air Force Records Disposition Schedule (RDS) in the Air Force Records Information Management System (AFRIMS).

Chapter 1

INTRODUCTION

1.1. The proactive use of negotiations, Alternative Dispute Resolution (ADR), and other conflict management processes can quickly and effectively resolve controversies in acquisition, environmental, international, real estate, tort, and other transactional areas. It is Air Force policy to voluntarily use these processes to the maximum extent practicable, at the earliest stage feasible, and at the lowest appropriate organizational level.

1.2. The skillful application of negotiation skills is the first step in managing conflicts and controversies. The Air Force Negotiation Center has resources applicable and available at www.culture.af.mil/nce.

1.3. When negotiations reach an impasse, ADR strategies must be considered and used to the maximum extent practicable. For the purposes of this manual, ADR is a process agreed to by the parties in which a third-party neutral assists in the resolution of an issue or issues in controversy.

1.4. This manual complements the provisions in Federal Acquisition Regulation (FAR) Subpart 33.2, *Disputes and Appeals*, Defense Federal Acquisition Regulation Supplement, Appendix A, Addendum II, *Alternative Methods of Dispute Resolution*, and Air Force Federal Acquisition Regulation Supplement (AFFARS) Subpart 5333.2, *Disputes and Appeals*. These provisions provide a framework for the pursuit of ADR strategies, and are essential parts of Air Force ADR governance.

1.5. This manual incorporates by reference the guidance contained in the Air Force Alternative Dispute Resolution Deskbook for Acquisition Professionals found at www.af.adr.mil. The Deskbook provides guidance as to when a matter is suitable for ADR and on how to conduct ADR when it is pursued. It also provides a template Memorandum of Understanding regarding the use of ADR which can be entered into between the Air Force and a given contractor at the commencement of an acquisition program or contract, and sample ADR template agreements which outline the conduct of ADR between parties to a contract dispute or issue in controversy.

Chapter 2

CRITICAL PLAYERS.

2.1. The Office of the Air Force General Counsel (SAF/GC). SAF/GC provides overall policy and guidance for the Air Force ADR Program, pursuant to AFD 51-12, and performs the functions of the Air Force Dispute Resolution Specialist (AFDRS). The AFDRS establishes and implements the Air Force conflict management programs through the Office of the Air Force General Counsel, Contractor Responsibility & Conflict Resolution (SAF/GCR) division.

2.1.1. The Director, Air Force Dispute Resolution (SAF/GCR). The Director, Air Force Dispute Resolution, as it pertains to acquisition, environmental, international, real estate, tort, and other transactional areas:

2.1.1.1. Leads the AF ADR program and manage the program budget.

2.1.1.2. Establishes the ADR program as a learning organization with a robust knowledge management infrastructure that identifies and distributes best practices and lessons learned.

2.1.1.3. Subject to guidance from SAF/GC, establishes and implements Air Force conflict management policy, programs, and education.

2.1.1.4. Identifies and eliminates unnecessary barriers to the use of ADR.

2.1.1.5. Ensures Air Force personnel are aware of and have access to existing conflict management resources.

2.1.1.6. Reports annually to the Secretary of the Air Force Quality regarding progress made in implementing the Air Force ADR Program. The report shall include an analysis of trends, an assessment of program effectiveness, recommended areas for appropriate actions and initiatives on ADR matters, and reference to the annual Environmental Collaboration and Conflict Resolution Policy Report.

2.1.1.7. Works with appropriate Air Force organizations, including but not limited to the office of the Assistant Secretary of the Air Force (Acquisition); the Assistant Secretary of the Air Force (Installations, Environment and Energy); the Assistant Secretary of the Air Force (Financial Management and Comptroller); the Deputy Chief of Staff, Logistics, Engineering and Force Protection; and the Judge Advocate General to support the development and implementation of the Air Force's Conflict Management programs in relevant transactional areas.

2.2. Air Force Legal Operations Agency, Commercial Law and Litigation Directorate (AFLOA/JAQ). AFLOA/JAQ promotes the timely and appropriate use of negotiations and ADR in the provision of legal services and field support for the resolution of contract litigation, bid protests, proposed final decisions.

2.3. Air Force Legal Operations Agency, Civil Law and Litigation Directorate (AFLOA/JAC). AFLOA/JAC promotes the timely and appropriate use of negotiations and ADR in the provision of legal services and field support for the resolution of general civil transactional disputes.

2.4. The Cognizant Legal Office for Contract Controversies and Disputes:

- 2.4.1. Promotes the timely and appropriate use of negotiations and ADR.
- 2.4.2. Advises contracting officers on ADR matters.
- 2.4.3. Uses guidance and resources found in the ADR Deskbook for Acquisition professionals.
- 2.4.4. Coordinates with AFLOA/JAQ on ADR suitability and strategy and also coordinates with SAF/GCR as identified in paragraphs 3.1.1.3., 3.1.3.3., and 3.2. (T-1)

Chapter 3

ADR PROCEDURES.

3.1. Acquisition ADR. The Air Force will attempt ADR in contract claims, protests, disputes, and controversies where unassisted negotiations between the contracting officer and contractor have reached an impasse and ADR is appropriate. The acquisition team, consisting of the contracting office, program manager, cognizant legal office, and AFLOA/JAQ as appropriate, must use ADR to the maximum extent practicable, including consideration of ADR suitability and strategies. (T-3)

3.1.1. Contracting Officer Final Decision (COFD). After negotiations between the contracting officer and contractor have reached an impasse, and before the contracting officer issues a final decision, a termination for default, or a termination for cause:

3.1.1.1. The cognizant legal office

3.1.1.1.1. Advises contracting officers regarding draft COFDs and terminations, and review draft COFDs and terminations for ADR suitability and strategies.

3.1.1.1.2. Assists contracting officers forward draft COFDs involving PEO programs, proposed COFDs on a claim greater than \$500,000, and information relating to any recommended termination for default or cause to SAF/GCR. Forwarding this information to SAF/GCR can be accomplished using a contract impasse report found in Attachment 2.

3.1.1.2. AFLOA/JAQ assists the cognizant legal office and contracting officer in the conduct of ADR proceedings to resolve pre-COFD disputes.

3.1.1.3. SAF/GCR receives draft COFDs and terminations as part of the ADR Program's knowledge management infrastructure and is available to assess opportunities for and facilitate the pursuit of ADR strategies.

3.1.2. During Litigation. ADR must be offered in litigation unless one of the exceptions in 5 U.S.C 572(b) applies or the policy criteria delineated in section 3.1.6. indicates that ADR is not appropriate. (T-3)

3.1.3. In a Protest. ADR must be used to the maximum extent practicable, including consideration of ADR suitability and strategies. (T-3)

3.1.4. Affirmative Contract Claims.

3.1.4.1. The cognizant legal office

3.1.4.1.1. Advises contracting officers and the Senior Contracting Office (SCO) regarding ADR suitability and strategies for affirmative Air Force claims.

3.1.4.1.2. Assists contracting officers notify the MAJCOM/DRU/AFRCO SCO or, in the case of AFLCMC and SMC, the Senior Center Contracting Official (SCCO) that negotiations have reached an impasse in resolving an affirmative air force claim.

3.1.4.1.3. Assists contracting officers in notifying AFLOA/JAQ and SAF/GCR when the Air Force has an affirmative contract claim, and is entitled to recover greater than \$500,000, and unassisted negotiations have failed to resolve the affirmative contract

- claim. A contract impasse report form for notifying SAF/GCR is embedded in AFFARS Part 5333 and can be found in Attachment 2.
- 3.1.4.2. The MAJCOM/DRU/AFRCO SCO or, in the case of AFLCMC and SMC, the SCCO, determines when negotiations related to an affirmative air force claim between the contracting officer and contractor have reached an impasse.
- 3.1.4.3. AFLOA/JAQ considers dispute resolution strategies pertaining to findings that the Air Force is entitled to recover in an affirmative contract claim.
- 3.1.4.4. SAF/GCR receives Air Force claims as part of the ADR Program's knowledge management infrastructure and is available to assess opportunities for and facilitate the pursuit of ADR strategies.
- 3.1.5. Rejected Contractor Requests for ADR by a Contracting Officer. When the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer, with assistance from the cognizant legal office, provides the contractor a written explanation of the specific reason or reasons that ADR is inappropriate for resolving the dispute. Reasons why ADR may be inappropriate include factors listed in paragraph 3.1.6. The cognizant legal office forwards the contracting officer's written explanation to AFLOA/JAQ and to SAF/GCR. (T-1)
- 3.1.6. Limitations on use of ADR. The Air Force shall consider not using ADR if one of the exceptions in 5 U.S.C. 572(b) applies or if the policy criteria delineated in this paragraph indicate that ADR is not appropriate:
- 3.1.6.1. The opposing party will not engage in ADR in good faith.
 - 3.1.6.2. Decision-quality information is not available and cannot be obtained.
 - 3.1.6.3. The issue is likely to settle without assistance, or in the context of litigation, can be resolved efficiently by motion.
 - 3.1.6.4. The contracting officer lacks authority to use ADR procedures to resolve.
 - 3.1.6.4.1. A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.
 - 3.1.6.4.2. The settlement, compromise, payment, or adjustment of any claim involving fraud.

3.2. Transactional Disputes. Negotiations, ADR, and other conflict management processes must be used to the maximum extent practicable, at the earliest stage feasible, and at the lowest appropriate organizational level to resolve controversies and disputes in environmental, international, real estate, tort, and other transactional areas. Attorneys and other subject-matter experts in these areas should proactively analyze controversies for ADR suitability and should coordinate with SAF/GCR as appropriate for additional resources and ADR guidance on specific matters.

Gordon O. Tanner
General Counsel

Attachment 1**GLOSSARY OF REFERENCES AND SUPPORTING INFORMATION*****References***

Title 5 U.S.C. § 571, *et seq.*, *Administrative Dispute Resolution Act of 1996*

Title 41 U.S.C. § 7101, *et seq.*, *Contract Disputes Act*

Office of Management and Budget and President's Council on Environmental Quality,
Memorandum on Environmental Collaboration and Conflict Resolution, 7 September 2012

Department of Defense Directive 5145.5, *Alternative Dispute Resolution*, April 22, 1996

Air Force Policy Directive 51-12, *Alternative Dispute Resolution*, 9 January 2003

Federal Acquisition Regulation, Part 33, *Protests, Disputes, and Appeals*

Air Force Federal Acquisition Regulation Supplement, Part 5333, *Protests, Disputes, and Appeals*

Prescribed Forms

None

Adopted Forms

AF Form 847, *Recommendation for Change of Publication*

Abbreviations and Acronyms

ADR—Alternative Dispute Resolution

ADRA—Administrative Dispute Resolution Act

AFDRS—Air Force Dispute Resolution Specialist

AFFARS—Air Force Federal Acquisition Regulation Supplement

AFLCMC—Air Force Life Cycle Management Center

AFLOA/JAC—Air Force Legal Operations Agency, Civil Law and Litigation Directorate

AFLOA/JAQ—Air Force Legal Operations Agency, Commercial Law and Litigation Directorate

AFRCO—Air Force Rapid Capabilities Office

COFD—Contracting Office Final Decision

DRU—Direct Reporting Unit

FAR—Federal Acquisition Regulation

MAJCOM—Major Command

SAF/GC—Office of the Air Force General Counsel

SAF/GCR—Office of the Air Force General Counsel, Contractor Responsibility & Conflict Resolution

SCCO—Senior Center Contracting Official

SCO—Senior Contracting Official

SMC—Space and Missile Systems Center

Terms

Alternative Dispute Resolution (ADR)—any procedures in which parties agree to use a third-party neutral to resolve a dispute, including but not limited to, facilitation, mediation, fact-finding, minitrials, arbitration or use of ombudsmen, or any combination thereof. Specific ADR procedures are discussed in the Alternative Dispute Resolution Deskbook for Acquisition Professionals, available at the SAF/GCR website, www.adr.af.mil.

Alternative Dispute Resolution (ADR) Agreement—the written agreement signed by both parties to an ADR that describes the elements of their agreed-to process. Common ADR agreement elements and sample ADR agreements are provided in the Air Force Alternative Dispute Resolution Deskbook for Acquisition Professionals, available at the SAF/GCR website, www.adr.af.mil.

Air Force Dispute Resolution Specialist (AFDRS)—the Principal Deputy General Counsel of the Air Force, who is responsible for developing and implementing the Air Force's ADR policy and program.

Acquisition Team—consists of the contracting office, cognizant legal office, and AFLOA/JAQ.

Contract Dispute—a formal or informal claim, or issue in controversy involving an Air Force contract or contract award, for which a remedial process is authorized by law, regulation, or policy.

Controversy—a material disagreement between the Government and the contractor that may result in a claim or is all or part of an existing claim.

Impasse—the point at which unassisted negotiations have failed to resolve a dispute.

Neutral—an individual who assists the parties in resolving their dispute without using traditional litigation.

Attachment 2**CONTRACT IMPASSE REPORT**

Please fill out the AFFARS 5333.290 information below

CONTRACTING OFFICER INFORMATION

Name:

E-mail:

CONTRACTOR INFORMATION

Contract Number:

Contract Type:

Contract Value:

ACTION DETAILS

Date of Action:

Dollar Amount of Action:

Type of Action:

- ☐ T4D ☐ complete ☐ partial
- ☐ T4C ☐ complete ☐ partial
- ☐ COFD involving PEO Programs
- ☐ COFD involving \$500,000 or more
- ☐ Affirmative AF Claim of \$500,000 or more
- ☐ Other

ADDITIONAL NOTES

Please send to SAF/GCR at: usaf.pentagon.saf-gc-mbx.saf-gcr-workflow@mail.mil